

**IN THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

|                                 |   |                                  |
|---------------------------------|---|----------------------------------|
| <b>UNITED STATES OF AMERICA</b> | ) |                                  |
|                                 | ) |                                  |
| <b>v.</b>                       | ) | <b>Case No.: 2:06-cr-226-CSC</b> |
|                                 | ) |                                  |
| <b>ELIJAH C. AARON</b>          | ) |                                  |

**MOTION TO CONTINUE TRIAL DATE**

COMES NOW the Defendant, **ELIJAH C. AARON**, by and through undersigned counsel, Kevin L. Butler, and pursuant to 18 U.S.C. §§ 3161(h)(8)(b)(i); 3161(h)(8)(b)(ii) and 3161(h)(8)(b)(iv) respectfully moves this Court to continue the trial of this matter past the currently scheduled January 8, 2007 trial term. No other requests for continuance have been filed in this case.

In support of this Motion, defendant would show the following:

1. Mr. Aaron is charged with driving under the influence of alcohol on the Maxwell Air Force Base.
2. Trial of this matter is presently scheduled for January 8, 2007.
3. Relevant and material to trial in this matter is the reliability and calibration of the Draeger Alcohol Breath Testing Instrument (Breathalyzer) used on Mr. Aaron at the time of his arrest. An analysis of the reliability and calibration of the Breathalyzer is done in part by reviewing the diagnostic testing of the machine and reviewing the test results provided before and after the machine was utilized to “breath test” a person.
4. Additionally, as law enforcement officers may not have actually observed the defendant driving a vehicle prior to his arrest, key to the defense is the identity and observations of an alleged “anonymous” caller.
5. Undersigned counsel has been informed by government counsel that it is not currently in

possession of the identity of the anonymous caller and that undersigned counsel must make arrangements with the Alabama Department of Forensic Sciences to inspect the Breathalyzer records.<sup>1</sup>

6. Receipt and analysis of this information is critical to the defense of this case. However, the investigation and analysis can not be completed on or before January 8, 2007. Therefore, it is in interest of justice to continue trial in this matter. This is the first request for continuance and this request is not for the purposes of delay.
7. Requests for continuances are addressed to the sound discretion of the trial court. United States v. Darby, 744 F.2d 1508, 1521 (11th Cir. 1984), reh. denied 749 F.2d 733, cert. denied 471 U.S. 1100 (1985). A continuance in order to allow defense counsel “the reasonable time necessary for effective preparation” for trial is one of the factors considered significant by the Speedy Trial Act. United States v. Davenport, 935 F.2d 1223, 1235 (11th Cir. 1991); 18 U.S.C. 3161 (h)(8)(B)(iv). The Eleventh Circuit has repeatedly recognized that a continuance

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<sup>1</sup> Undersigned counsel strongly disagrees with the government’s position that it is the defense’s responsibility to make arrangements to inspect the Breathalyzer machine’s diagnostic materials. *See* Docket #18 paragraph 3. The government has elected to prosecute Mr. Aaron and utilize as its “expert” an agent of the Alabama Department of Forensic Sciences. Therefore, it is the prosecution’s responsibility to provide under Fed. R. Crim. P. 16(E) & (F), this Court’s Standing Order on Discovery, and *Brady*, these diagnostic materials. Under the government’s logic, if discoverable material is passed (or held) by another government agency and out of the hands of an individual prosecutor, the prosecutor is no longer responsible for providing discoverable information. This form of reasoning is contrary to the law and would reek havoc in certain prosecutions (e.g. drug prosecutions involving drug analysis and materials that are routinely sent out of the district for analysis). It is the individual prosecutor’s responsibility to make this information available to the defense. *See, Kyles v. Whitley*, 514 U.S. 419 (1995). It is not the defendant’s responsibility to locate the information and make arrangements for its inspection.

However, prior to requesting any further court action on this discovery dispute, undersigned counsel will work with government counsel to make arrangements for the inspection of these and other requested materials.

in order to provide adequate preparation by counsel serves the ends of justice. United States v. Goetz, 826 F.2d 1025, 1028 (11th Cir. 1987) (upholding, against speedy trial claim, a continuance of eighty days to allow new counsel to prepare for trial); United States v. Elk3ins, 795 F.2d 919, 924 (11th Cir. 1986), cert. denied 479 U.S. 952 (1986) (upholding against speedy trial claim, a continuance to allow new counsel time to prepare); United States v. Sarro, 742 F.2d 1286, 1300 (11th Cir. 1984), reh. denied 751 F.2d 394 (1984).

8. Pursuant to 18 U.S.C. §§ 3161 (h)(B)(i); 3161(h)(8)(B)(ii), and 3161(h)(8)(B)(iv), this Court has the authority to continue trial to allow counsel the additional time to prepare and review discoverable evidence.

**FOR THE REASONS ABOVE**, Mr. Aaron respectfully requests that this Motion be granted and the trial in this matter be continued from the January 8, 2006 trial docket.

Respectfully submitted,

s/ Kevin L. Butler  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Reese H. Hays, III, Esquire  
Special Assistant United States Attorney  
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Respectfully submitted,

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